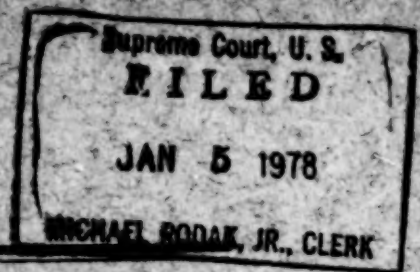


No. 77-522



In the Supreme Court of the United States
OCTOBER TERM, 1977

WALTER J. DOZIER, PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT**

**BRIEF FOR THE UNITED STATES
IN OPPOSITION**

WADE H. MCCREE, JR.,
Solicitor General,

BENJAMIN R. CIVILETTI,
Assistant Attorney General,

JOSEPH S. DAVIES, JR.,
DEBORAH WATSON,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statutes involved	2
Statement	2
Argument	6
Conclusion	10

CITATIONS

Cases:

<i>Blumenthal v. United States</i> , 332 U.S. 539	9
<i>Kotteakos v. United States</i> , 328 U.S. 750	8
<i>United States v. Beer</i> , 518 F. 2d 168	8
<i>United States v. Crowley</i> , 522 F. 2d 427	8
<i>United States v. Darby</i> , 289 U.S. 224	8
<i>United States v. Docherty</i> , 468 F. 2d 989	6, 7
<i>United States v. Gens</i> , 493 F. 2d 216	6
<i>United States v. Meyer</i> , 266 F. 2d 747, certiorari denied, 361 U.S. 875	8

Statutes:

18 U.S.C. 2	2
18 U.S.C. 371	2
18 U.S.C. 657	2
18 U.S.C. 1006	2, 8

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-522

WALTER J. DOZIER, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT*

**BRIEF FOR THE UNITED STATES
IN OPPOSITION**

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-3) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 1, 1977. A petition for rehearing was denied on September 7, 1977. A petition for a writ of certiorari was filed on October 6, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to sustain petitioner's convictions.
2. Whether the evidence established the existence of a single conspiracy.

(1)

STATUTES INVOLVED

The relevant provisions of Title 18 of the United States Code are set forth at Pet. 2-5.

STATEMENT

Following a jury trial in the United States District Court for the Middle District of North Carolina, petitioner was convicted of conspiring to misapply federally-insured funds and to make false entries in violation of 18 U.S.C. 371 (Count I); of willful misapplication of federally insured funds in violation of 18 U.S.C. 657 and 2 (Counts II and III); and of making a false entry on the reports and records of a federally insured savings and loan association, in violation of 18 U.S.C. 1006 and 2 (Count XI).¹ Petitioner was sentenced to three years' imprisonment and fined \$5,000 on Counts I and II, sentenced to two years' imprisonment and fined \$5,000 on Counts III and XI, the sentences to run concurrently (Pet. 6). The court of appeals affirmed (Pet. App. 1-3).

The government's evidence showed that at the time in question petitioner's co-defendant, C. Paul Roberts, a land developer and general contractor, was approaching his maximum borrowing limit at Home Savings and Loan Association of Durham, North Carolina (the "Association").² Petitioner was shown to have conspired with

¹Petitioner was one of six defendants charged in a 17-count indictment (see Pet. 5-6).

²A Federal Home Loan Bank Board regulation provides that an individual or a company in which that individual is a ten percent or more owner can borrow only a certain amount, depending upon the total savings or reserves of the association. At this time the Association's limit was approximately \$7,000,000 to one company or group of companies owned or controlled by one individual. Roberts was approaching that limit during this period (Tr. 107-108).

Roberts and certain officers of the Association in a scheme in which various straw borrowers—including petitioner—acquired on Roberts' behalf Association loans in excess of Roberts' borrowing limit. Petitioner was also shown to have made a false entry on an affidavit in connection with one of these loans.

In July of 1972, at Roberts' urging, Homeco (a wholly-owned subsidiary of the Association) purchased a tract of land in Durham (known as the "DICO" property) with the proceeds of an Association loan (Tr. 77-78, 83-84, 87, 147).³

Roberts then arranged through an officer of the Association to allow Gregory Real Estate Company, a corporation owned by petitioner, to build single-family units on one section of the property (Tr. 83, 296-298). On the basis of a loan application that petitioner signed as president of Gregory Real Estate, the Association loaned \$1,200,000 to Gregory Real Estate for the purchase of the property and the construction and development of approximately 300 residential home sites. On the same day the \$1,200,000 loan was made, petitioner, as president of Gregory Real Estate, signed a contractor's lien waiver affidavit, which the Association required before the loan could be closed. The affidavit falsely represented Gregory Real Estate as both owner and contractor for the project, when in fact Roberts was the true owner and contractor (Tr. 300, 353). This action constituted the basis for Count XI.

Petitioner thereafter misapplied loan funds he received from the Association by channeling them to Roberts for his use in the development of the single-family units on

³The proceeds of this loan were used not only for the purchase by Homeco of this land, but also to pay surveying and engineering work done on the property for Roberts (Tr. 306-309).

the DICO property. This action formed the basis for Count II. Between November 13, 1972, and August 2, 1973, disbursements in the amount of \$344,388.50 were made by the Association to petitioner's company, Gregory Real Estate. Petitioner, however, merely acted as a conduit for transfer of these funds from the Association to Roberts. Petitioner endorsed these disbursements checks for Gregory Real Estate and then deposited them at a bank, where they were used to purchase money orders, which were in turn deposited into accounts held by either Roberts himself or various corporations identified as Roberts' companies (Tr. 353-358). For example, \$196,700 was traced to the account of Triangle Nursing Home, a Roberts company in no way involved in the development of the single-family dwellings. Of the total amount disbursed between November 1972 and August 1973, only \$22,000 was traced into the Gregory Real Estate account (Tr. 309-311, 354-355, 356-362, 678-679).

3. In addition to this transaction, petitioner and others misapplied further loans from the Association—ostensibly made to persons other than Roberts—by transferring the loan proceeds to Roberts to develop another portion of the DICO property. This second part of the development of the DICO property involved the construction of 34 four-unit apartment houses. Roberts, doing business as "Empire Properties," was to be the general contractor and developer. In March 1973, Roberts arranged with an officer of the Association for the funding of this part of the development by 27 separate loans for the construction of the apartments (Tr. 92-94). Shortly thereafter, the Association made 27 loans of \$32,000 each to various persons, all of whom acted as conduits to Roberts: seven of the loans were to Gregory Real Estate, petitioner's company; twelve were to relatives of Roberts; one was to the secretary of Roberts' company, Empire Properties; five were to the President of Mutual Savings and Loan

Association of Durham, North Carolina; and two were to officers and employees of Mutual Savings and Loan Association (Tr. 97-107, 183-187).⁴ These transactions were the basis for Count III.

Of the seven loans the Association made to petitioner's firm, petitioner had agreed to hold four on behalf of John Wheeler, a director of Mutual Savings and Loan Association. When construction was completed on the apartments for which these four loans had been made, they were to be conveyed to Wheeler (Tr. 105-117, 121-122). In the fall of 1973, Wheeler purchased these four apartments from Roberts; he had no dealings with petitioner or Gregory Real Estate in connection with the purchase (Tr. 276-278).

The evidence also showed that the 27 loans made in the names of Roberts' relatives and employees and in the name of petitioner's firm, Gregory Real Estate, were in fact loans to Roberts, and that the straw "borrowers" had no interest therein. The history of these loans reflects that each unit was fully financed from the proceeds of the loan made by the Association and that there was no initial investment on the part of any of the named borrowers. The records also reflect that the interest coming due during the period of the loan was subtracted from the proceeds of the loan, thus relieving the named borrowers of any obligation to pay interest during the construction period of the loan (Tr. 117-118, 158, 190, 198). The deed records to the lots upon which the apartments were to be built show that at approximately the time of their

⁴An employee of Empire Properties testified that at Roberts' direction he filled out the loan applications for Roberts' relatives, stating that the named borrowers were employed. In fact these relatives of Roberts were full-time college students (Tr. 216-225, 245-250).

completion, the properties were transferred from the named borrowers to various other individuals. The purchasers dealt directly with Roberts and had no contact with any of the borrowers named on the records of the Association (Tr. 183-186).

ARGUMENT

I. Petitioner contends that the evidence presented at trial was insufficient to establish violations of the statutes under which he was charged.

a. Petitioner alleges that since the Gregory Real Estate Company was engaged in the lawful activity of borrowing mortgage funds, and since the funds of the Association were secured by a promissory note, by a first mortgage security instrument on the property involved, and by the solvency of Gregory Real Estate Company, there could be no conversion of the Association's funds unless the government demonstrated fraud in the procurement of the loans (Pet. 14). In particular, petitioner alleges that the decision in this case is in conflict with *United States v. Gens*, 493 F. 2d 216 (C.A. 1), and *United States v. Docherty*, 468 F. 2d 989 (C.A. 2), which held that in certain circumstances the use of "straw" borrowers to obtain funds was not a misapplication of funds.

The borrowing activity sanctioned in *Gens* and *Docherty* is, however, a far cry from the activity condemned by the Fourth Circuit in the instant case. The court in *Gens* expressly recognized that a debtor's transfer of the proceeds of a loan to a third party constitutes a misapplication when bank officials assured the debtor that they would look to a third party for repayment and "the debtor allowed only his name to be used, enabling the bank officials to grant a *de facto* loan to a third party to whom the bank was unwilling to grant a formal loan." 493 F. 2d at 22. In that circumstance the funds have been

misapplied, since there is little likelihood or expectation that the named debtor will repay. Similarly, in *Docherty*, the court held only that the debtor's transfer of loan proceeds to a third party in violation of the bank's internal rules did not constitute misapplication when the debtor "knew he was putting his own credit on the line [and apparently he had] the means to repay" (468 F. 2d at 995).

The evidence in this case shows that petitioner, Roberts, and the officials at the Association clearly considered the loans to petitioner as *de facto* loans to Roberts, who was unable to obtain further loans in his own right, and that employees of the Association clearly looked to Roberts for repayment and understood Roberts was the contractor and developer of the property. Petitioner therefore knowingly aided the scheme devised by Roberts and Association officials to circumvent the maximum lending limit by making loans to petitioner, who was not expected to make repayment. Indeed, when the Association had difficulty in securing timely interest payments on the \$1,200,000 loan, an officer approached petitioner and requested his assistance in persuading Roberts to bring the payments up to date (Tr. 301-302), instead of attempting to secure the payments from petitioner's company, the nominal borrower.

b. Petitioner also maintains (Pet. 16-17) that his conviction for falsifying the contractor's affidavit he executed in connection with the development loan is invalid because the purpose of the affidavit was not to certify that he was the contractor—which he clearly was not—but simply to afford the Association additional evidence that workers who had improved the property covered by the loan had been paid.

There is ample evidence, however, that petitioner aided an officer of the Association to make a false entry with the intent to deceive the officers and agents of the Association within the meaning of Section 1006. Petitioner signed the contractor's affidavit (swearing that all subcontractors and materialmen had been paid) representing that his firm was the contractor and thereby concealing from the Association's Board of Directors the fact that Roberts was the real contractor.⁵ When the Vice President of the Association (who had the responsibility for seeing that the affidavit was properly executed) allowed the false and misleading affidavit to be entered in petitioner's loan file, despite his knowledge that petitioner was not the contractor, the offense under Section 1006 was complete. Since petitioner certainly knew he was not the contractor nor the true owner of the project, his completion of the misleading affidavit with an intent to conceal Roberts' identity as the true contractor established petitioner's participation in the making of a false entry.

2. Petitioner also contends (Pet. 17-21) that a prejudicial variance existed between the indictment and the proof—i.e., although one large conspiracy was charged and evidence was admitted in accordance with this theory, the evidence in fact showed a number of smaller conspiracies. In support of this contention, petitioner analogizes his case to *Kotteakos v. United States*, 328 U.S. 750. In contrast to the present case, however, *Kotteakos* involved a series of fraudulent loan

⁵Since the application concealed the fact that Roberts, who could not legally do so directly, was receiving the proceeds of the loan, there was the intent to deceive that is required for a violation under 18 U.S.C. 1006. *United States v. Darby*, 289 U.S. 224; *United States v. Crowley*, 522 F. 2d 427 (C.A. 7); *United States v. Beer*, 518 F. 2d 168 (C.A. 5); *United States v. Meyer*, 266 F. 2d 747 (C.A. 5), certiorari denied, 361 U.S. 875.

applications in which the only connection between the separate groups of defendants was their common, independent use of a certain agent to handle the loan applications—a pattern described by this Court as “separate spokes meeting in a common center * * * without the rim of the wheel to enclose the spokes.” *Id.* at 755. Here the evidence demonstrated the existence of a single, comprehensive plan whereby Roberts acquired, through the use of several straw borrowers, funds to finance his development of a project he was incapable of financing himself due to the borrowing limit at the Association. The scheme devised by Roberts and certain officers of the Association enabled the Association to extend credit to Roberts for the construction of both the single and multiple-family projects in violation of federal regulations, while allowing these officials and Roberts to conceal their respective interests.

Petitioner was aware of the scope of Roberts' plans. He knew that Roberts was building the single-family project using funds loaned in petitioner's name and that, in addition to the seven apartments financed in petitioner's name, 27 other such apartments also were being built. Petitioner also knew that Roberts could not finance either phase of the project himself, and that Roberts needed other straw borrowers—in addition to petitioner—to implement his plans. Indeed, petitioner agreed to have four of the loans put in his name as an accommodation to John Wheeler. Accordingly, as this Court concluded in *Blumenthal v. United States*, 332 U.S. 539, 558: “[I]t hardly can be sufficient to relieve [petitioner] that [he] did not know, when [he] joined the scheme, who those people were or exactly what parts they were playing in carrying out the common design and object of all. By their separate agreements, if such they were, they became parties to the larger common plan, joined together by

their knowledge of its essential features and broad scope, though not of its exact limits, and by their common single goal."

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

BENJAMIN R. CIVILETTI,
Assistant Attorney General.

JOSEPH S. DAVIES, JR.,
DEBORAH WATSON,
Attorneys.

JANUARY 1978.